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No. 95-1243

In the Supreme Court of the United States

OCTOBER TERM, 1995

GERALD FRANK PLUNK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause barred petitioner's prosecution for ten drug trafficking offenses after the prior uncontested administrative forfeiture of property and cash seized from him.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unpublished, but the judgment is noted at 68 F.3d 482 (Table). The order of the district court granting in part and denying in part petitioner's motion to dismiss (Pet. App. 4-15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1995. A petition for rehearing was denied on December 14, 1995. Pet. App. 29. The petition for a writ of certiorari was filed on February 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the District of Alaska returned a superseding indictment charging petitioner with two counts of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846; operating a continuing criminal enterprise, in violation of 21 U.S.C. 848; four counts of using a communications facility to facilitate a controlled substance offense, in violation of 21 U.S.C. 843; and three counts of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 6. Before trial, petitioner moved to dismiss the ten counts of the indictment against him on the ground that his trial on those counts would violate the Double Jeopardy Clause. The district court dismissed five of the counts against petitioner, but declined to dismiss the remaining five. *Id.* at 15.[1] The court of appeals affirmed the denial of petitioner's motion to dismiss five of the counts and reversed the district court's order to the extent that it granted petitioner's motion to dismiss the other five counts. *Id.* at 1-3.

1. On March 22, 1994, law enforcement officers applied for a warrant to search petitioner's home in Anchorage, Alaska. The affidavit in support of the application stated that between 1980 and 1990, petitioner had sold cocaine to Warren Jeff Funderburk; that in April 1993, petitioner had recruited Hal Booher to transport cocaine from Los Angeles and Houston to New Jersey; and that between August and December 1993, Booher, at petitioner's behest, had

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[1] The superseding indictment contained 12 counts. Pet. App. 6. Counts 7 and 8 alleged violations of 21 U.S.C. 843 by petitioner's co-defendant, and those counts are not at issue here.

transported seven or eight loads of cocaine weighing between 200 and 220 kilograms each. On the basis of that affidavit, a magistrate judge issued the warrant. Gov't C.A. Br. 3.

During the ensuing search of petitioner's home, government agents seized, among other items, $9,660 in cash, $967.89 worth of Placer gold, and assorted firearms worth approximately $4,040. On March 25, 1994, petitioner was arrested. At the time of his arrest, law enforcement agents seized a Rolex watch, valued at $1,500, from petitioner's wrist. Gov't C.A. Br. 3; see Pet. App. 6-7.

2. On March 24 and April 18, 1994, the Drug Enforcement Administration (DEA) issued notices of seizure for the firearms, currency, and Placer gold seized from petitioner's home, and for the Rolex watch seized from petitioner at the time of his arrest. Each notice stated that the property in question was subject to forfeiture because it "was used or acquired as a result of a drug related offense." Gov't C.A. Br. 4. Each notice also stated that a claimant "may petition the DEA for the return of the property or [the claimant's] interest in it * * * and /or * * * may contest the seizure and forfeiture of the property." *Ibid.* The notice explained the procedure for filing a claim or a petition for remission of the forfeiture and stated that a "claim of ownership" to the property must be filed within 20 days of first publication of the notice. *Id.* at 4-5. The notices were mailed to petitioner's home and to his place of detention. *Id.* at 5. As required by federal regulation, the DEA also published notification of the seizures and potential forfeiture of each item (as well as the procedure for

filing a claim) in *USA Today* on three successive Wednesdays. *Ibid.*; see Pet. App. 2.[2]

Petitioner did not file a claim to the property or a petition for remission of the forfeiture. Accordingly, in June and August 1994, the DEA administratively forfeited the seized items to the United States. Pet. App. 2, 6-7.

3. Before trial, petitioner moved to dismiss the superseding indictment, alleging that he had already been punished by the administrative forfeiture of the property and that his trial on the superseding indictment would violate the Double Jeopardy Clause's prohibition of multiple punishments for the same offense. A magistrate judge recommended that the motion be granted. Pet. App. 16-28. Relying on *United States* v. *$405,089.23 in United States Currency*, 33 F.3d 1210 (1994), amended on denial of rehearing, 56 F.3d 41 (9th Cir. 1995), cert. granted, 116 S. Ct. 762 (1996) (to be argued Apr. 17, 1996), the magistrate judge found that the administrative forfeiture and the criminal prosecution were "separate proceedings" for purposes of the Double Jeopardy Clause and that petitioner had been punished by the administrative forfeitures even though he failed to file a claim to the forfeited property. Pet. App. 21-26. On that basis, the magistrate judge concluded that the criminal prosecution could not proceed without

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[2] In each instance, an individual acting as petitioner's agent acknowledged receipt of the notice at petitioner's home. In addition, the DEA received acknowledgement that an individual acting as petitioner's agent received two of the notices sent to petitioner's place of detention. Petitioner does not contend that he did not receive notice of the seizures and forfeitures. See Pet. App. 2.

violating the multiple punishments prong of the Double Jeopardy Clause. *Id.* at 27.

The district court agreed with the magistrate judge that the administrative forfeitures constituted "punishment" of petitioner, but it held that the prior "punishment" barred prosecution only of five counts of the indictment. See Pet. App. 9-15. In explaining that conclusion, the court examined the affidavit submitted by the government in support of the application for the warrant to search petitioner's property. That affidavit, the district court determined, established probable cause to believe that petitioner had committed the offenses later charged in Counts 1, 9, 10, 11, and 12 of the superseding indictment—the counts alleging that petitioner had conspired to distribute cocaine and that he had possessed cocaine with the intent to distribute it. The court concluded that the administrative forfeitures had been based on the information supporting those counts; that the forfeitures "punished" petitioner for the commission of those offenses; and that petitioner therefore could not receive additional punishment for those offenses in a separate criminal proceeding. *Id.* at 11-13. The district court held, however, that the remaining counts did not rest on "the same criminal acts upon which the administrative forfeitures proceeded," and that the Double Jeopardy Clause therefore did not bar a subsequent criminal prosecution on those counts. *Id.* at 13-14.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1-3. Relying on *United States* v. *Cretacci*, 62 F.3d 307 (9th Cir. 1995), petition for cert. pending, No. 95-7955 (filed Feb. 13, 1996), the court held that petitioner had abandoned the seized property by failing to file a claim to it, and that the

administrative forfeiture of abandoned property "does not impose a 'punishment' for purposes of the Double Jeopardy Clause." Pet. App. 2. The court also found *Cretacci* to be dispositive of petitioner's argument that he could not have filed a claim to the seized property without compromising his Fifth Amendment privilege against compulsory self-incrimination. Because "a defendant's claim of ownership of property that was subject to forfeiture may not be used" at trial to prove the defendant's guilt, the court stated, the administrative forfeiture proceedings placed no burden on petitioner's exercise of Fifth Amendment rights. *Id.* at 3 (quoting *Cretacci*, 62 F.3d at 311). Finally, the court of appeals dismissed as "moot" petitioner's cross-appeal challenging the district court's refusal to dismiss five counts of the indictment. Pet. App. 3.

ARGUMENT

Petitioner contends (Pet. 11-23) that the Double Jeopardy Clause bars his criminal conviction on the offenses charged in the indictment after the forfeiture of the cash and property seized from him. The court of appeals correctly rejected that contention, and it does not warrant further review.[3]

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[3] Petitioner apparently seeks review by this Court of that portion of the Court's order that dismissed his cross-appeal. The merits of petitioner's cross-appeal are not properly before this Court, however, because the court of appeals lacked jurisdiction to consider it. As we explained in our opposition to the petition for certiorari filed in *Baird* v. *United States*, cert. denied, 116 S. Ct. 909 (1996) (No. 95-630), a multiple punishments claim, such as petitioner raises, is not subject to interlocutory appeal, because "that aspect of the [double jeopardy] right can be fully vindicated on an appeal following final

1. The Double Jeopardy Clause prohibits the imposition of multiple punishments for the same offense in separate proceedings. See *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). In *United States* v. *Halper*, 490 U.S. 435 (1989), this Court held that after imposition of a criminal punishment, the Clause's "multiple punishments" prohibition barred imposition of a civil penalty that is "so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Id.* at 442. Subsequently, in *Austin* v. *United States*, 113 S. Ct. 2801 (1993), the Court held that the civil forfeiture provisions at issue in that case are sufficiently punitive to be subject to review under the Excessive Fines Clause of the Eighth Amendment. The courts of appeals are currently divided with respect to the application of the Double Jeopardy Clause to successive criminal punishment and civil forfeiture based on the same underlying conduct, and this Court recently granted the government's petitions for certiorari in two cases that raise aspects of this issue. See *United States* v. *$405,089.23 in United States Currency*, *supra*; *United States* v. *Ursery*, 59 F.3d 568 (6th Cir. 1995), cert. granted, 116 S. Ct. 762 (1996) (to be argued Apr. 17, 1996).

Every court of appeals that has considered the issue has held, however, that a person who does not contest the forfeiture of property cannot claim to have suffered punishment as a result of that forfeiture. See *United States* v. *German*, 76 F.3d 315, 317-320 (10th Cir. 1996); *United States* v. *Idowu*, 74 F.3d 387, 392-396 (2d Cir. 1996); *United States* v.

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judgment." *Abney* v. *United States*, 431 U.S. 651, 660 (1977). We have supplied petitioner with a copy of our brief in *Baird*.

Sykes, 73 F.3d 772, 773-774 (8th Cir. 1996); *United States* v. *Baird*, 63 F.3d 1213, 1217-1219 (3d Cir. 1995), cert. denied, 116 S. Ct. 909 (1996); *United States* v. *Cretacci*, 62 F.3d 307, 310-311 (9th Cir. 1995), petition for cert. pending, No. 95-7955 (filed Feb. 13, 1996); *United States* v. *Arreola-Ramos*, 60 F.3d 188, 192 (5th Cir. 1995); *United States* v. *Torres*, 28 F.3d 1463, 1465 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994). Those courts have recognized that administrative forfeiture can be used only to obtain the forfeiture of unclaimed property.[4] Thus, when the government gives notice that it intends to obtain the forfeiture of property, and the recipient of that notice fails to take appropriate steps to preserve his interest in the property, the government may consider the property abandoned or

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[4] Under 21 U.S.C. 881(d), the provisions of the customs laws governing summary forfeiture may be used against property that is subject to forfeiture under the controlled substances laws. See also 21 C.F.R. 1316.74-1316.77. The applicable customs statutes, 19 U.S.C. 1602-1621, provide for the administrative forfeiture of specified categories of seized property if the government publishes notice of seizure and intention to forfeit the property. If no claim is filed, the agency has the authority to declare the property forfeited without a judicial determination. See 19 U.S.C. 1609; 21 C.F.R. 1316.77. If a proper claim and bond (or proof of indigence) is filed, the agency seeking forfeiture must transmit the matter to the appropriate United States Attorney's Office to commence a judicial forfeiture action. See 19 U.S.C. 1608. To commence that action, the government files an in rem complaint against the property and publishes notice of the forfeiture proceeding. Any person who wishes to contest the judicial forfeiture must file a claim and an answer to the complaint. See Rule C, Supplemental Rules for Certain Admiralty and Maritime Claims. In judicial forfeiture proceedings, a claimant may challenge the government's right to obtain forfeiture and may raise an innocent owner defense.

ownerless, at least by that person. As the Ninth Circuit has explained, "[j]ust as the seizure of abandoned property cannot be said to implicate the former owner's privacy rights, the forfeiture of abandoned property cannot be said to implicate the former owner's double jeopardy rights." *United States* v. *Cretacci*, 62 F.3d at 310-311 (citations omitted). See also *United States* v. *Baird*, 63 F.3d at 1218 ("Because Baird never asserted an interest in the money that was seized from his residence, he cannot now claim to have been punished by its forfeiture."); *United States* v. *Arreola-Ramos*, 60 F.3d at 192 (because only unclaimed property may be administratively forfeited, administrative forfeiture "punishes no one"); *United States* v. *Torres*, 28 F.3d at 1466 (administrative forfeiture does not impose punishment on person who fails to establish an interest in the forfeited property). Petitioner did not file a timely claim when the government initiated the administrative forfeiture of the cash seized from him, and his double jeopardy claim is therefore without merit.

Moreover, a person who fails to file a claim in response to a notice that the government will seek administrative forfeiture of property never becomes a party to any forfeiture proceeding. Even assuming that an individual may be placed "in jeopardy" other than in a criminal case, a person who has not participated in a proceeding cannot be said to have been placed "in jeopardy" within the meaning of the Double Jeopardy Clause. See *United States* v. *German*, 76 F.3d at 320 (jeopardy does not attach in administrative forfeiture proceeding); *United States* v. *Pena*, 67 F.3d 153, 155-156 (8th Cir. 1995) (defendant not placed in jeopardy by administrative forfeiture proceeding); *United States* v. *Arreola-Ramos*, 60 F.3d at 192

("Absent a trial, a party, and a punishment, jeopardy can never attach."); *United States* v. *Baird*, 63 F.3d at 1218 ("jeopardy does not, and cannot, attach until one is made a *party* to a proceeding"); *United States* v. *Torres*, 28 F.3d at 1465 ("As a non-party, Torres was not at risk in the forfeiture proceeding, and '[w]ithout risk of a determination of guilt, jeopardy does not attach.'") (quoting *Serfass* v. *United States*, 420 U.S. 377, 391-392 (1975)). Petitioner's failure to file a claim therefore precludes a finding that he was in jeopardy or suffered punishment in the administrative forfeiture.[5]

2. Petitioner also argues (Pet. 13-19) that he could not have contested the administrative forfeiture without incriminating himself, and that the forfeiture therefore violated his rights under the Fifth Amendment. Petitioner failed, however, to assert his Fifth Amendment rights at the time the government gave him notice of the administrative forfeiture. Had petitioner made a valid and supported showing that he would be incriminated by making a claim to the seized property, he could have sought a stay of the forfeiture proceedings or a delay in the filing of a judicial

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[5] This Court has made clear that "the Double Jeopardy Clause * * * does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott*, 437 U.S. 82, 98-99 (1978). When a defendant makes a deliberate decision "to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he was accused," he cannot claim in a subsequent proceeding that he has been "twice put in jeopardy." *Ibid.*; see *Ricketts* v. *Adamson*, 483 U.S. 1, 10-12 (1987). By declining to file a claim to the seized property, petitioner avoided becoming a party to the forfeiture action. He therefore cannot claim that the subsequent criminal proceedings violated his rights under the Double Jeopardy Clause.

forfeiture action until the criminal charges against him had been resolved. See *United States* v. *Premises Located at Route 13*, 946 F.2d 749, 756 (11th Cir. 1991); *United States* v. *$250,000 in United States Currency*, 808 F.2d 895, 901 (1st Cir. 1987). Petitioner's "failure * * * to assert the constitutional privilege leaves him in no position to complain now that he [would have been] compelled to give testimony against himself." *United States* v. *Monia*, 317 U.S. 424, 427 (1943) (if an individual "desires the protection of the privilege, he must claim it").[6]

3. Petitioner contends (Pet. 19-23) that the Ninth Circuit should not have applied its holding in *Cretacci* "retroactively" in deciding his case. This Court has held, however, that in both civil and criminal cases, newly declared rules of law must be applied to all cases pending on direct review. *Griffith* v. *Kentucky*, 479 U.S. 314, 320-328 (1987); see *Harper* v. *Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993) (rule

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[6] In *Cretacci*, the Ninth Circuit held that a defendant's claim of ownership to property in a forfeiture proceeding may not be used to prove his guilt in a later prosecution for the offenses that gave rise to the forfeiture. See 62 F.3d at 311. The court relied on this Court's decision in *Simmons* v. *United States*, 390 U.S. 377 (1968), which held that a defendant's claim of ownership to property at a pretrial suppression hearing may not be used to prove the defendant's guilt at trial. Judge Kleinfeld declined to join that portion of the court's opinion in *Cretacci*, arguing that the possibility that property may be lost unless the owner makes a claim in a forfeiture proceeding does not constitute compulsion within the meaning of the Fifth Amendment. See 62 F.3d at 311. Because petitioner did not make a timely assertion of his Fifth Amendment right, the validity of the approach adopted in *Cretacci* is not before the Court.

announced by the Court "is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule"); see also *Reynoldsville Casket Co.* v. *Hyde*, 115 S. Ct. 1745, 1748 (1995) (restating *Harper* holding). The Ninth Circuit was therefore correct in applying *Cretacci* to petitioner's case.

4. There is no reason to hold this case pending the disposition of *United States* v. *Ursery*, No. 95-345, and *United States* v. *$405,089.23 in United States Currency*, No. 95-346. In *$405, 089.23*, the Ninth Circuit held that the civil judicial forfeiture of drug proceeds under 21 U.S.C. 881(a)(6) invariably constitutes punishment under the Double Jeopardy Clause. In *Ursery*, the Sixth Circuit held that the civil judicial forfeiture of property used to facilitate a drug crime under 21 U.S.C. 881(a)(7) always amounts to punishment for double jeopardy purposes. The government's brief in those consolidated cases argues that civil forfeiture followed by criminal prosecution does not raise double jeopardy concerns, that the forfeitures at issue do not constitute punishment, that civil forfeiture and the criminal offense on which it rests are never the "same offense" under the Double Jeopardy Clause, and that parallel civil forfeiture and criminal actions constitute a single proceeding for purposes of the multiple punishments prong of the Double Jeopardy Clause.

Although this Court's acceptance of the government's arguments in *Ursery* and *$405,089.23* would provide additional grounds on which to reject petitioner's claims, a decision favorable to the respondents in those cases would not provide petitioner with

a basis for relief. The Ninth Circuit, which has taken the most expansive view of the application of the Double Jeopardy Clause to civil forfeiture proceedings, rejected petitioner's claim in this case. See also *United States* v. *Cretacci*, *supra*; *United States* v. *Washington*, 69 F.3d 401 (9th Cir. 1995). Accordingly, a decision adverse to the government in *Ursery* and *$405,089.23* would have no effect on the validity of the court of appeals' reasoning in the instant case.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1996

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[7] We note that this Court recently denied three petitions for a writ of certiorari that presented the question whether a criminal conviction following an administrative or other uncontested forfeiture violated the Double Jeopardy Clause. See *Baird* v. *United States*, 116 S. Ct. 909 (1996); *Penny* v. *United States*, 116 S. Ct. 931 (1996); *Nakamoto* v. *United States*, No. 95-7313 (Apr. 1, 1996); see also *Smith* v. *United States*, cert. denied, No. 95-6830 (Apr. 1, 1996) (uncontested judicial forfeiture following criminal conviction).